(9)

No. 96-643

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

THE STEEL COMPANY, a/k/a CHICAGO STEEL AND PICKLING COMPANY,
Petitioner,

VS.

CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CHEMICAL MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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May 2, 1997

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Interest of *Amicus Curiae*

The Chemical Manufacturers Association (CMA) is a non-profit trade association whose member companies account for more than 90% of the U.S. productive capacity for basic industrial chemicals.[1] The U.S. chemical industry

[1] Pursuant to Supreme Court Rule 37, the written consent of the parties to CMA's *Amicus* brief were obtained and are on file in the Clerk's Office. Additionally, pursuant to Rule 37, this brief was prepared and paid for in its entirety by CMA.

is the industry most affected by the reporting requirements of the Emergency Planning and Community Right-to-Know Act (EPCRA).

The two provisions at issue in this case are sections 312 and 313 of EPCRA. Section 312 requires certain facilities to submit inventory forms annually to state and local agencies providing information regarding the amount and location of "hazardous chemicals" at the facilities during the previous year. Section 313 requires certain facilities using any of 651 specified "toxic chemicals" to submit forms to EPA annually providing information about the amount of the chemicals present at the facilities and their routine emissions during the previous year. This is called the Toxic Release Inventory or the TRI. 42 U.S.C. §§11023(a), (g).

The vast majority of chemicals produced by CMA's member companies -- roughly 85% by volume -- are subject to the TRI reporting requirements of EPCRA section 313.[2] These chemicals are the core of virtually every product people use or consume in the United States, from pharmaceuticals and medical supplies to computers, electronics, and the Internet. These chemicals are essential to the U.S. and global economies.[3]

If this Court upholds the decision of the court of appeals in this case, it will have enormous, adverse consequences for the chemical industry and will pose equally significant problems for numerous other businesses, large and small alike. Further, this decision will impose an excessive and

[2] This percentage includes those chemicals that are used as a component or catalyst in production.

[3] The chemical and allied products industry employs over 1 million workers (8.9% of whom are scientists and engineers); produces 1.9% of the U.S. Gross Domestic Product; and during the ten-year period 1986-1995 was responsible for a cumulative trade surplus of $153 billion.

unnecessary burden on the federal courts. This Court should consider these repercussions as it undertakes its analysis of the legal issues presented.

Statement

CMA and its members are staunch supporters of the public's right-to-know of the environmental and health risks they face in their communities. CMA is an equally committed supporter of EPCRA and the Pollution Prevention Act of 1990 (PPA), which amended EPCRA. 42 U.S.C. §§ 13101 *et. seq.* In fact, CMA relies upon TRI data generated under EPCRA as the performance measure for the Responsible Care® Pollution Prevention Code, a chemical industry initiative promoting continuous improvement in waste reduction. Accordingly, CMA firmly believes that effective enforcement of EPCRA is vital.

However, the decision in this case does not promote the effective enforcement of EPCRA. The Seventh Circuit's analysis was blurred by two important misunderstandings. Most fundamentally, the court seriously underestimated EPCRA's reporting complexities. Secondarily, the court exaggerated the significance of costs incurred by citizen groups in ferreting out facilities that fail to comply with EPCRA's reporting requirements. Pet. App. A14-A15. These misperceptions interfered with the Court's interpretation of EPCRA's citizen suit provision, resulting in a decision that improperly imposes civil penalties on a diverse group of businesses, most of which are trying diligently to comply with EPCRA's complicated and ever-changing reporting requirements. EPCRA's reporting complexities are substantial, imposing obligations of a magnitude far more burdensome than the minimal costs incurred by citizen groups investigating EPCRA violations. The discussion below describes these reporting difficulties,

as well as the sweeping and unfair consequences posed by the decision in this case.

1. EPCRA Reporting Requirements Are Highly Complex

Several factors make EPCRA's reporting requirements considerably more complicated than the court of appeals assumed.

a. Chemical Listings Are In Flux

EPCRA's reporting requirements are triggered by the presence of certain quantities of specific chemicals. Each reporting requirement is linked to a particular list of chemicals. These lists of "toxic," "hazardous," and "extremely hazardous" substances are in a state of flux -- additions and deletions to these lists are made regularly by EPA. For example, when EPCRA was enacted in 1986, Congress placed 309 individual chemicals and 20 chemical categories on the TRI list. There are now 651 chemicals and 28 chemical categories on this list. Therefore, a company that properly determines that it is not currently subject to EPCRA's reporting requirements could face significant liability if it inadvertently fails to note a subsequent change in the chemical lists. *See* General Accounting Office, *EPA's Toxic Release Inventory Is Useful But Can Be Improved,* GAO/RCED 91-121 (June 1991). Under this decision, each and every facility caught unaware of a sudden change in EPCRA's chemical lists is subject to a citizen suit even after it rectifies all errors during the 60-day notice period.

b. EPCRA's Reporting Requirements Are Comprehensive And Demanding

TRI reporting requires certain manufacturing and processing facilities that use more than 10,000 pounds of a

toxic chemical, or that manufacture, import, or process more than 25,000 pounds of a toxic chemical, to complete and submit a Form R. Once reporting is triggered, a facility must estimate all releases of the reportable substances during normal operations, i.e., all releases to land, underground injection, discharges to water, point source air emissions and non-point source air emissions. 42 U.S.C. §11023.

Not only must facilities estimate all releases for any given chemical, they also must complete and submit a separate Form R for each and every chemical at the facility that falls within the reporting parameters noted above. Since chemicals are the chemical industry's business, it is not uncommon for a facility of one of CMA's larger member companies to handle as many as 88 chemicals or chemical categories that are subject to TRI reporting requirements in any given year. EPA, *1994 Toxics Release Inventory Public Release Data,* at 36. These reporting requirements involve sophisticated engineering calculations that frequently require significant technical expertise to complete the Form Rs. *See* EPA, *Toxic Chemical Release Inventory Reporting Form R and Instructions, Revised 1995 Version,* at 28-35.[4]

Thus, contrary to the Seventh Circuit's conclusion that "the cost of compliance . . . is low[, requiring] little additional effort,"[5] considerable effort and expense *is* required to comply with EPCRA's reporting requirements. In fact, EPA estimates that the reporting burden is more than one full work week per facility for just one listed chemical. Pesticide & Toxic Chemical News, *CMA Survey Notes TRI Paperwork as Most Onerous,* 6, at 6-8, (April 17, 1996). How does this translate into dollars? Using EPA estimates

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[4] Eleven copies of the *Toxic Chemical Release Inventory Reporting Form R and Instructions, Revised 1995 Version* have been lodged with the Clerk of the Court for the Court's convenience.

[5] Pet. App. A14-A15.

once again, TRI reporting costs for 1993 - 1996 totaled almost $1 billion.[6]

Under the decision below, every facility that innocently miscalculates a routine release (either by under- or overestimating) for a reportable substance, despite its diligent efforts, is subject to a citizen suit even after it corrects the miscalculation during the 60-day notice period.

c. EPCRA's Reporting Instructions Are Lengthy, Revised Constantly, And Subject To Variable, But Legally Enforceable, Agency Interpretations

Although the TRI reporting form is a mere 9 pages long, it should not be confused with the 1040 EZ tax form. The sheer length of the reporting instructions -- 58 pages *plus* 3 tables *plus* 8 appendices -- demonstrates the complexity of the reporting process. *See* EPA, *Toxic Chemical Release Inventory Reporting Form R and Instructions, Revised 1995 Version*. A glance at "Example 9: Calculating Releases and Transfers" on page 34 of the instructions, or any other example or significant instruction, confirms the complexity of the reporting requirements. And, confusing the reporting process even further, EPA has revised the reporting instructions *every year* since EPCRA's inception. In short, EPCRA reporting is never routine.

Exacerbating an already arduous process, EPA enforces interpretations of reporting obligations that it has never made public in regulations or other EPCRA publications. For example, in 1994, EPA brought an administrative action against a CMA member company alleging that it had not complied with EPCRA reporting requirements for 1988

[6] Industry figures are higher than those of EPA, both in reporting burden and cost. CMA, *Environmental Paperwork: A Baseline for Evaluating EPA's Paperwork Reduction Efforts*, 8-9 (April 3, 1996).

through 1992. EPA claimed that the company failed to report a TRI-listed chemical that was produced during a transitory chemical reaction, i.e., where, for a *fleeting moment* during a chemical process, a TRI-listed chemical was created and then converted to a different chemical *not* subject to TRI reporting.[7] This transitory chemical reaction was not addressed in the Form R instructions or any other regulation or publication pertaining to EPCRA. *See* Letter from CMA to EPA re: *EPCRA Section 313 Reporting: Transient Reaction Chemistry* (Sept. 16, 1994), App. A1-A6. Although EPA's interpretation had never been addressed in EPA guidance documents, the enforcement action resulted in a fine and a consent agreement. *See* Consent Agreement, App. A11.

Under the decision below, every facility that interprets the Form R instructions (which change every year) in a manner inconsistent with EPA's interpretation of the requirements (whether published or not) will remain subject to a citizen suit even after the facility complies with EPA's interpretation during the 60-day notice period. In fact, under this decision, even a facility that complies with an EPA interpretation *before* ever receiving a citizen suit notice is still subject to a citizen suit.

2. EPA Intends To Expand The Scope Of The TRI Reporting Requirements

EPA has announced its plans to expand the TRI reporting requirements. This expansion -- embracing new industries and adding more complicated reporting obligations -- promises to transform EPCRA's already complex reporting system into a compliance labyrinth. EPA's recent proposals

[7] A simple example is the manufacture of Trichloro X, where the basic chemistry of the chlorinating sequence is monochloro X to *dichloro X* to trichloro X, where *dichloro X* is an EPCRA 313-listed chemical.

include two distinct expansions. The first, announced on April 22, 1997, adds seven new industry sectors (including many small businesses), and makes other significant changes affecting many facilities already subject to EPCRA's reporting requirements. The second expansion, due to be final in November 1997, proposes to add occupational demographics and detailed tracking of chemical use in products (i.e., materials use accounting) to TRI reporting. TRI's interpretive complexities will balloon if materials use accounting is adopted. At a minimum, collecting and reporting will require each facility to interpret the rule; identify the covered chemicals; identify and separate chemicals in mixture streams; design and implement appropriate information management systems; and train personnel, not to mention the laborious steps necessary to track chemical use for each chemical affected. *See* CMA, *Comments to EPA on ANPRM on TRI Phase 3: Materials Accounting*, 64-69 (February 14, 1997). Companies and businesses are certain to confront authentic compliance problems despite their very best intentions.

Even EPA officials recognize that these changes will result in errors, publicly stating:

> *This is not unusual. People learn by doing.* [T]he Agency is developing guidance to ease reporting for these groups, *which are expected to have unique compliance problems.*[8]

The frequency of innocent errors should not be underestimated. Under EPCRA's current reporting complexities, it is not at all uncommon for medium-to-large-

[8] *Toxic Release Inventory Expansion Rule Still Undergoing Budget Office Review*, Daily Report for Executives (BNA) Vol. 42, at A22 (March 4, 1997). (Emphasis added).

size CMA member companies to make anywhere from 10 to 15 corrections per year to past TRI filings. Technically, those companies are out of compliance. Under the holding in this case, each and every one of those companies is subject to a citizen suit for each and every inaccurate report even after it comes into compliance during the 60-day notice period.

3. The Decision Of The Seventh Circuit Will Discourage Voluntary Audits And Reporting Corrections, And Will Excessively Burden The Federal Courts

Amicus and its member companies are committed to the goals of the public's right-to-know embodied in EPCRA. Accordingly, CMA members will continue to revise past EPCRA filings to correct errors or reflect changed interpretations despite the inevitably unfair and costly consequences resulting from the decision in this case.[9] However, many businesses, particularly smaller ones, are far less financially capable of withstanding the potential flurry of citizen suits that will follow if the ruling below is not reversed. Under this decision, correcting an erroneous filing will *increase* liability rather than limit it. This perverse disincentive can only discourage regulated entities from voluntarily seeking out and correcting TRI reporting errors. CMA and its members are deeply troubled by this result, which undermines the voluntary compliance goals and objectives of EPA and Congress.

4. The Seventh Circuit Seriously Overestimated The Costs To Citizens Enforcing EPCRA

Even if the costs incurred by citizens were an appropriate inquiry for the court, the Seventh Circuit incorrectly

[9] Every correction made to a past filing is in essence an admission of having been out of compliance. Such an admission is all that a citizen will require to sue for civil penalties.

determined that if citizens could not sue when a violator came into compliance during the 60-day notice period, "citizens would have no real incentive to incur the costs of learning about EPCRA, investigating suspected violators, and analyzing information. Put simply, if citizens can't sue, they can't recover the costs of their efforts." Pet. App. A14. However, Congress intended the 60-day notice period to compel compliance. Congress was concerned that citizens recoup their costs *only* if the violator or the government did not act during the 60-day notice period and the citizen was forced to litigate. Moreover, contrary to the Seventh Circuit's assessment, public access to EPCRA reporting information is widely available on CD ROM and the Internet, and thus the cost of monitoring companies subject to EPCRA requirements is truly minor.

SUMMARY OF ARGUMENT

The Seventh Circuit distorted the plain language of EPCRA's citizen suit provision, striking from the statute a critical purpose of the 60-day notice requirement: to provide an alleged violator with notice of a violation so that it can bring itself into compliance *without* the need for litigation. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987). Under this decision, the *only* time a citizen suit can ever be barred under EPCRA is when the government brings an action first.

Not only did the Seventh Circuit err in its analysis of EPCRA's citizen suit provision, but allowing CBE's case to proceed raises serious Constitutional questions about CBE's standing to sue for corrected EPCRA violations. CBE failed to set forth clear and specific facts demonstrating that it suffered actual or threatened harm. More importantly, any harm that may have been suffered was redressed when The Steel Company filed all of its EPCRA reports during the 60-

day notice period *before* CBE filed its complaint. Accordingly, the Court should construe the citizen suit provision in EPCRA narrowly to avoid the significant Article III issue that would otherwise arise.

ARGUMENT

CONGRESS DID NOT AUTHORIZE CITIZEN SUITS FOR EPCRA VIOLATIONS CORRECTED DURING THE 60-DAY NOTICE PERIOD

EPCRA's citizen suit provision provides that any person may bring a civil action against an owner or operator of a facility "for failure to . . . complete and submit" inventory forms "under" section 312 or toxic chemical release forms "under" section 313 of the act. 42 U.S.C. § 11046(a)(1). However, a citizen must first give notice of the "alleged violation" to EPA, the State in which the "alleged violation occurs," and the alleged violator 60 days before filing suit. *Id.* at §11046(d)(1). The purpose of this requisite notice prior to filing a citizen suit is to provide the government with the opportunity to enforce EPCRA's requirements, and to allow the violator the opportunity to comply in order to avoid litigation. In either event, a citizen suit should be barred. *Gwaltney*, 484 U.S. at 60.

The Seventh Circuit incorrectly determined that EPCRA authorizes citizen suits for violations corrected during the 60-day notice period based on two erroneous findings. First, the court concluded that the statutory language, "failure to," indicates either a past or present failure and, therefore, is not limited to ongoing violations as this Court held was the case under the Clean Water Act in *Gwaltney*. Pet. App. A13. Second, the court concluded that the most natural reading of

the word "under" in reference to sections 312 and 313 in the citizen suit provision is "in accordance with the requirements of the referenced sections." *Id.* Therefore, because sections 312 and 313 require that the reports be submitted by specific dates, the court determined that EPCRA must authorize citizens to enforce timely compliance with its requirements. The court stated that any other interpretation "would render gratuitous the compliance dates . . . ." *Id.*

Although the Seventh Circuit began its analysis properly by looking for the "plain and ordinary meaning" of the specific language in question, the court's efforts unquestionably derailed as it failed to follow other well-established principles of statutory construction, resulting in a seriously flawed ruling. "Statutory interpretation is a holistic endeavor." *United Savings Association v. Timbers of Inwood Forest*, 484 U.S. 365, 371 (1988). Courts must look to "the particular statutory language at issue, as well as the language and design of the statute as a whole -- to its object and policy" when searching for the plain and ordinary meaning of a statute. *Crandon v. U.S.*, 494 U.S. 152, 158 (1990); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). To interpret the citizen suit provision most plausibly, a court must read it in relation to the statute's other, equally relevant provisions. Otherwise, the court will fail to give full effect to EPCRA's overall objective. *Gwaltney,* 484 U.S. at 57.

The Seventh Circuit failed to consider the significance of two crucial provisions in EPCRA. First, it ignored the 60-day notice provision and with it the purpose of citizen suit provisions generally. *Notice by Citizen Plaintiffs in Environmental Litigation,* 79 MICH. L. REV. 299, 301-307 (1980). Second, it disregarded a provision barring citizen suits when the government acts only to enforce compliance and not to obtain civil penalties. 42 U.S.C. §11046(e). In so

doing, the court entirely misconstrued the plain and ordinary meaning of the citizen suit provision.

A. The 60-Day Notice Provision And The Purpose Of Citizen Suits

Congress intended that citizen suits supplement government enforcement. *Gwaltney,* 484 U.S. at 60. By requiring citizens to comply with the 60-day notice provision, Congress allows government agencies to enforce the environmental laws without the need for a citizen suit. *Id.* at 59-60. "In many cases, an agency may be able to compel compliance through administrative action, thus eliminating the need for any access to the courts." *Id.* at 60. Similarly, notice gives the alleged violator "an opportunity to bring itself into compliance . . . and likewise" obviate the need for a citizen suit. *Id.* Congress believed that the threat of suit would trigger agency enforcement and encourage violators to comply without overburdening the courts with citizen suits. *See Notice by Citizen Plaintiffs in Environmental Litigation, supra,* at 304-307. As the facts of this case well illustrate, the 60-day notice requirement achieves that objective.[10]

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[10] *See also Hallstrom v. Tillamook County*, 493 U.S. 18, 24, 28 (1989), (stating that EPCRA's citizen suit provision was modeled after the Clean Air Amendments of 1970); Hearings on S. 3229, S. 3466 & S. 3546 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 91st Cong., 2d Sess. (1970) at 1184 (statement of Douglas M. Head, Minnesota Attorney General): "The one danger . . . is the multiplicity of suits that would override compliance agreement already entered into by the [Minnesota] Pollution Control Agency so that I believe that citizens should be very carefully correlated with the present enforcement provision so that we do not unnecessarily duplicate the enforcement of the law and that we do not unnecessarily clog up the course where we are in fact making very swift efforts to enforce."

By allowing a citizen suit to proceed even if a company comes into compliance during the 60-day notice period, the Seventh Circuit's decision totally defeats a primary purpose of the provision, striking it from the statute altogether. No longer is any purpose served by providing the violator with notice of the violation and the intent to sue. Under the decision below, the *only* time a citizen suit can ever be barred under EPCRA is when the government takes action. This result is certain to flood the federal courts with unnecessary citizen suits. Clearly, this was not the intent of Congress. If it had been, Congress would not have required citizens to notify violators of their intent to sue. Alternatively, Congress would have expressly provided for litigation regardless of compliance. The court's analysis simply defies logic and the unambiguous purpose of the statute.

In a rather curious statement, the Seventh Circuit states that the logic underlying this portion of the citizen suit notice provision:

> is no longer as compelling as it was when *Gwaltney* was decided. Since then, Congress has expressly intended precisely [that citizen suits should lie for past violations]. The Clean Air Act . . . contains a notice provision just like the one in the Clean Water Act. In 1990 Congress amended the Clean Air Act to permit citizen enforcement actions for past violations, yet left the notice provision intact.

Pet. App. A13.

What the court failed to recognize is that (1) the Clean Air Act Amendment permits citizen enforcement of past violations *only* when they are *repeated* violations,[11] and (2) the amendment has absolutely no effect on EPCRA or any statute other than the Clean Air Act. Indeed, the Clean Air Act Amendments argue forcefully against the ruling below. They demonstrate that Congress knows precisely how to craft a notice provision that permits a citizen suit to go forward in the face of compliance. The fact that Congress chose not to amend EPCRA in a comparable fashion reveals that it is not a statute where citizens should proceed against companies after they have come into compliance during the 60-day notice period.

An equally formidable effect of the decision below is the enormous burden it will impose on the federal courts. With the addition of seven new industry sectors to the 461 industries already subject to EPCRA's increasingly complex reporting requirements, as well as the addition of chemical use reporting, the burden could be staggering. *See* EPA, *Toxic Chemical Release Inventory Reporting Form R and Instructions Revised 1995 Version*, Table I. This result is completely at odds with Congressional intent to strike a balance between encouraging citizen suits and avoiding an excessive and unnecessary burden on the federal courts after compliance has been achieved.

B. Citizen Suits Prohibited When EPA Seeks Only Compliance

A second EPCRA provision ignored by the Seventh Circuit provides that a citizen may not sue where EPA has brought and is diligently prosecuting either an administrative order or a civil action "to enforce the requirement concerned *or* to impose a civil penalty . . . ." 42 U.S.C. §11046(e).

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[11] 42 U.S.C. § 7604(a)(1).

Congress was clearly satisfied that compliance alone -- without civil penalties being imposed -- was sufficient to bar citizen suits when compliance is sought by EPA (the primary enforcement authority for EPCRA violations). EPCRA does not contain any language suggesting Congress was not also equally satisfied that compliance alone should bar a citizen suit when the *threat* of that suit secures compliance during the 60-day notice period.[12] Indeed, it is irrational to conclude that entities who come into compliance independently should remain exposed to fines, while those who only do so in response to governmental order are shielded from liability.

The Seventh Circuit failed to respect the structure and purpose of the statute as a whole when it obsessed over:

> citizens' . . . incentive to incur the costs of learning about EPCRA, investigating suspected violators, and analyzing the information . . . [and whether] private citizens . . . have to absorb much of the cost of monitoring chemical use . . . with little or no hope of recovering those costs through awards of litigation expenses.

As stated earlier, these costs are minimal and dwarfed in comparison to the costs of EPCRA compliance.

[12] Further, under every other environmental statute -- except where Congress has expressly stated to the contrary -- this same 60-day notice provision operates to bar a citizen suit when a violator comes into compliance during the 60-day notice period. It does not make sense that Congress would treat EPCRA -- a reporting statute -- differently than every other environmental statute concerned with potential risk to human health and the environment.

C. "Plain and Ordinary Meaning" Requires Simple Common Sense

"Plain and ordinary" means obvious, direct, simple, and customary[13] -- words suggesting that a practical, common sense approach to the statute is in order. Since Congress intended citizens only to supplement government enforcement and not to overburden the federal courts, EPCRA's citizen suit provision should be interpreted consistent with these Congressional objectives and the overall objectives of the statute. In contrast to the Seventh Circuit's and CBE's rather tortured and convoluted interpretation of the relevant words (which they read in isolation rather than in context with the rest of the statute), the Sixth Circuit's decision in *Atlantic States Legal Foundation v. United Musical Instruments, U.S.A., Inc.* is consistent with these objectives. 61 F.3d 473 (6th Cir. 1995).

In *United Musical*, the court concluded that although sections 312 and 313 of EPCRA require the submission of inventory forms by certain dates, the citizen suit provision emphasizes only completing and submitting the forms, not mentioning dates or the timeliness of reporting at all. *Id.* at 475. Moreover, sections 312 and 313 identify various procedures for completing and submitting the required forms. The due dates for the reports are merely one of many procedural steps directed to those who complete and submit the forms. Had Congress intended to authorize citizen suits for *any* violation -- such as late submission -- it could easily have done so. *Id.* Most simply, it could have inserted the word "timely" between the words "and" and "submit." Alternatively, it could have said "in compliance with the requirements of" instead of merely using the term "under."

[13] Webster's New World Dictionary 1001, 1087 (2d. ed. 1986).

Importantly, EPCRA itself distinguishes between the narrow conditions under which citizen suits can be filed and the broader circumstances under which EPA can act. For example, EPCRA authorizes EPA to bring actions to assess and collect civil penalties against any person "who violates any requirement of section [313]." 42 U.S.C. § 11045(c)(1). The Sixth Circuit recognized that:

> Congress limited citizen suits by emphasizing that it is the failure to submit the requisite forms that gives rise to a citizen action. Congress did not authorize citizen suits for other violations of section [313]. This difference between the grants of authority to the EPA and citizen plaintiffs is significant because it indicates a congressional intent to limit citizen suits to ongoing violations and to give the EPA *sole* authority to seek penalties for historical violations.

61 F.3d at 475. (Emphasis added).

The Sixth Circuit's decision also gives full effect to EPCRA's two overriding objectives -- emergency planning and public access to the required information. Once the forms providing the information are filed, the Congressional goals are achieved and a citizen suit is unnecessary. *Id.* at 477. Although civil penalties may be appropriate in some cases, Congress left that decision to EPA. *Id.* It is the government that has "the broad perspective on enforcement and compliance" that is best suited to determine those violators whose conduct warrants penalties. *Id.*

D. If The Court Has Doubts About The Breadth Of EPCRA's Citizen Suit Provision, It Should Resolve Them Against Respondent To Avoid The Serious Article III Issue That Would Otherwise Arise

CBE bears the burden of establishing that it has standing to invoke the jurisdiction of this Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 553, 561 (1992). Standing requires that CBE "clearly and specifically set forth facts sufficient to satisfy" the following three criteria:

> "injury-in-fact" -- a "concrete and particularized, actual or imminent" invasion of a legally protected interest;
>
> a causal connection between the injury and the conduct of the petitioner; and
>
> a likelihood, not mere conjecture, "that the injury will be redressed by a favorable decision."

Id.; *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). CBE has failed to set forth clear and specific facts that it has suffered an injury-in-fact and that any injury, if it had occurred, would be redressed by a favorable decision of this Court.

CBE must allege facts demonstrating that at least one of its members has suffered some actual or threatened harm. *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972); *Warth v. Seldin*, 422 U.S. 490, 504 (1975); *Lujan*, 504 U.S. at 560. This "requires more than an injury to a cognizable interest" such as "aesthetic and environmental well-being" or "environmental interests" that are shared by many. *Morton,* 405 U.S. at 734-735. It requires that at least one of CBE's members be among the injured "in a personal and individual

way." *Lujan,* 504 U.S. at 560. "Generalized grievances" and remote possibilities are not sufficient. *Warth,* 422 U.S. at 500, 504, 507.

CBE has never alleged any facts that establish an injury. Beginning with its initial complaint and persisting throughout each of its briefs, CBE alleges only that it was:

> deprived of information . . . crucial to the public welfare . . . [that] its interests in protecting and improving the environment and the health of its members have been . . . adversely affected by defendant's actions . . . [that t]he safety, health, recreational, economic, aesthetic and environmental interests of CBE's members and their right to know . . . have been . . . adversely affected . . . [that] members of CBE have suffered and continue to suffer . . . [that] the Local Emergency Response Commission's emergency plan . . . is skewed and inaccurate . . . [and that] CBE and its members are relying on the incomplete data [in public data] reports . . . to identify and respond to environmental concerns and to encourage industry to reduce the use of hazardous chemicals.

See Citizens for a Better Environment's (CBE) Complaint at ¶¶ 1,8, and 9; Opening Brief before the U.S. Court of Appeals for the Seventh Circuit at 11 and 41-42; and Brief In Opposition to Petition for Certiorari, at 3.

CBE claims that it was deprived of the information companies gather under EPCRA "to identify and respond to

environmental concerns and to encourage industry to reduce the use of hazardous chemicals." *See* Brief In Opposition, at 3. Presumably, the interest CBE claims was injured was its access to information. Imposing penalties in this case, however, will not redress that "injury," since The Steel Company filed all of its EPCRA reports during the 60-day notice period before CBE filed its complaint. As a result, CBE now has access to the information of which it claims it was deprived and the asserted injury has been remedied. To construe EPCRA's citizen suit provision as permitting a claim in this case would raise a serious Constitutional standing problem, which argues forcibly for interpreting EPCRA as not authorizing this litigation. *De Bartolo v. Florida Gulf Coast Building & Construction Trades Council,* 485 U.S. 568 (1989); *NLRB v. The Catholic Bishop of Chicago,* 440 U.S. 490 (1979).

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that the decision of the Seventh Circuit be reversed.

Respectfully submitted,

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APPENDIX

Chemical Manufacturers Association
September 16, 1994

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Re: **EPCRA Section 313 Reporting: Transient Reaction Chemistry**

Dear Mr. Sasnett:

The Chemical Manufacturers Association's (CMA's) Pollution Prevention Regulatory Work Group (PPRWG) is disappointed that you could not attend our August 11, 1994 meeting to discuss the issue of transient reaction chemistry as it relates to the Emergency Planning and Community Right-to-Know Act (EPCRA) Toxic Release Inventory (TRI) reporting requirements. The purpose of the meeting was to discuss the scope and impact of your February 16, 1994 memorandum to Mr. Ernest Regna, Chief, EPA Pesticides and Toxic Substances Branch, regarding treatment of transient reaction chemistry under EPCRA Section 313. (See Attachment.) We are concerned by EPA's apparent view that transition products which may be formed and further transformed in closed systems are now considered to fall within the purview of EPCRA.[14] CMA believes such an

[14] These would include "polymerizations and similar reactions which may involve many steps and literally thousands of intermediate

interpretation is inconsistent with the purposes of EPCRA--to promote risk communication and foster significant risk reduction activities.

As CMA interprets your February 16 memorandum, during a sequential reaction (A to B to C) or decomposition sequence (C to B to A), if a TRI-listed reaction product is formed (Chemical B in either example), but then converted to another chemical, (TRI-listed or non-listed), EPA expects a facility to assess this transient product for TRI reporting regardless of how long the transitory reactant exists. [15]

CMA has serious concerns regarding this interpretation of EPCRA, and the process by which it has been reached. First, CMA believes that EPA has failed to provide adequate public notice of its interpretation. Second, we are concerned about the lack of bright-line criteria regarding assessment of transient reaction products. Finally, CMA is concerned about the compliance burden imposed by EPA's interpretation. Each of these concerns is explained in greater detail below.

First, CMA believes EPA has failed to provide adequate public notice of its interpretation. As you know, CMA was very active in the development of EPCRA Section 313. The proposed and final rules implementing Section 313 discussed coincidental manufacture; however, the issue of non-coincidental transitory reactants or decomposition materials was not addressed. In conflict with the conclusion

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compounds." EPA April 1989 Final Monthly Hotline Report. (See Attachment.)

[15] A simple example is the manufacture of *Trichloro X*, where basic hornbook chemistry of the chlorination sequence is: monochloro *X to dichloro X* to trichloro X, and where *dichloro X* is a EPCRA 313-listed chemical.

reached in EPA's February 16, 1994 memorandum, EPA's final rule on Section 313 unambiguously states that the Agency's approach to defining "manufacture" "was intended to cover listed chemicals which were created (intentionally or unintentionally) and then passed on in commerce or disposed of, but never otherwise accounted for." 53 Fed. Reg. 4500, 4504 (February 16, 1988). Unlike byproducts and impurities, which are formed and then leave the manufacturing system, transitory reaction products and/or decomposition products are neither passed on in commerce nor disposed of.

CMA further disagrees with EPA's statement that the issue of transition chemistry has been publicly addressed.[16] We can find no reference to this issue, or any notice of availability of the Hotline Monthly Report, in either the Federal Register or in any of the EPA Toxic Chemical Release Inventory Reporting Form R and Instructions.[17] In addition, neither of the two Toxic Chemical Release Inventory Questions and Answers documents EPA published in 1990 and 1991 addresses this issue.[18] In fact, CMA has found nothing in the public domain to support the statement that EPA ever considered this issue in the EPCRA Section 313 rulemaking, or otherwise communicated a position on this issue to the regulated community.[19]

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[16] "The Agency has already answered substantially the same question in a publicly available document." Memorandum from Sam Sasnett, Chief, EPA Toxics Release Inventory Branch to Ernst Regna, Chief, EPA Pesticides and Toxic Substances Branch, February 16, 1994. (See Attachment.)

[17] Including the revised 1993 version of the Form R, see e.g., Appendix I, Section 313 Related Materials and Information Access.

[18] See EPA 560/4-91-003 (revised 1990 version), 560/4-90-003 (revised 1989 version).

[19] In fact the term, "intermediates", is not even defined under EPCRA, nor in the TRI reporting regulations, 40 C.F.R. 372 *et. seq.*. nor in the

Second, CMA is concerned about the lack of "bright line" criteria on how long transient material must exist to be considered for TRI reporting. The approach taken in the February 16 memorandum defies practical interpretation since it implies that a manufacturer must screen the TRI chemical list to determine if a listed chemical may be formed transiently in the production or decomposition of another substance. We understand that EPA presumes that, for some compounds, there will always be a 1-to-1 ratio between each molecule of a product produced and any transitory products that may form in a manufacturing process. In many cases, transition products may exist for only a fraction of second until the reaction sequence is completed. As a result, the compliance burden imposed by application of the Agency's February 16 memorandum is significant.[20]

EPA Toxic Chemical Release Inventory Reporting Form R and Instructions.

[20] The lack of bright-line criteria for assessing transitory reaction products places a significant compliance burden upon reporters who must attempt to collect this information. The compliance burden includes identification of the transient species in chemical processes for determination if the process meets EPCRA reporting thresholds. It also includes a facility-wide assessment as to whether, taken as a whole, transient formation in multiple operations could meet or exceed the EPCRA reporting threshold. This burden has never been considered by EPA or the Office of Management and Budget (OMB) in assessing the cost of EPCRA Section 313. EPA's original burden estimate of Section 313 assumed that an average reporting facility would be submitting four chemical reports and one mixture report/year. See, I.C.F. Inc. Regulatory Impact Analysis in Support of Final Rulemaking Under Section 313 of Tittle III of the Superfund Amendment and Reauthorization Act of 1986 (February 1988). In addition, the Agency's recently proposed chemical expansion of the TRI also does not consider the burden imposed by assessing transient species, 59 Fed. Reg. 1788 (January 12, 1994), on an expanded list of more than 300 chemicals and chemical categories.

Third, CMA is concerned about the burden the Agency imposes on the regulated community to ascertain the potential formation of TRI-listed transitory reaction or decomposition products. This imposes a significant additional compliance burden upon the regulated community particularly since EPA has recently proposed doubling the Section 313 list of regulated materials. The burden inherent in verifying whether any specific chemical could form a transition product in a complex chemical reaction would be enormous. As noted earlier, basic chemistry suggests that there are numerous TRI-listed chemicals which could form during sequential chemical reactions in the formation of other listed chemicals. CMA does not believe that Congress or EPA intended to require the regulated community to search the TRI list of specific chemicals and chemical categories to determine if their processes or thermal units might "manufacture" TRI-listed chemicals as transient species. In the past, EPA has recognized that non-isolated transient species are extremely difficult to identify and have limited exposure potential. 48 Fed. Reg. 21729 (May 13, 1983) (EPA exempted non-isolated intermediates from reporting under the Toxic Substances Control Act because these substances are extremely difficult to identify and have limited exposure potential.)

Finally, the February 16 memorandum is inconsistent with the Agency's efforts to redefine the glycol ethers category for TRI reporting, 59 Fed Reg. 34386 (July 1, 1994). For example, if the criteria described in the memorandum are applied to manufacturers of (presently excluded) high molecular weight glycol ethers, these same manufacturers would now be obligated to submit TRI reports on transient low molecular weight glycol ether species that may form in process equipment during the manufacture of the excluded high molecular weight products. Such a result is clearly not consistent with the relief provided by the final

rule. Similarly, application of the February 16 memorandum to on-site thermal treatment units would cause reporting of TRI listed transitory species formed during molecular decomposition as "manufactured" by the facility -- a result that is inconsistent with the structure of the current Section 313 reporting form and regulation.

CMA does not believe that the issue of transient reaction chemistry has been adequately considered by the Agency or is well-settled under EPCRA. We also do not believe that the Agency's seeming reluctance to address this matter through rule clarification (versus rule enforcement) complies with Executive Order 12862 (Setting Customer Service Standards), or Executive Order 12866 (Regulatory Planning and Review). The process by which EPA has reached its current position on transient reaction chemistry is inconsistent with administrative fairness and statutory due process.

CMA previously requested a meeting with your office to help us gain a better understanding of the Agency's position. We would appreciate your involvement in arranging such a meeting in the near future. Please contact Leslie Winik at (202) 887-4764 if you have any questions, or would like to discuss this matter further.

Sincerely,

Claudette M. Cofta
Director,
Product Stewardship

Attachment

cc: Mark Greenwood, EPA OPPT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION II

In the Matter of XXXXXXXX Respondent. Proceeding under Section 325(c) of Title III of the Superfund Amendments and Reauthorization Act	CONSENT AGREEMENT AND CONSENT ORDER DOCKET NO. II EPCRA-94-0113

PRELIMINARY STATEMENT

This administrative proceeding for the assessment of a civil penalty was instituted pursuant to Section 325 (c) of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C § 11001 et seq. [also known as the Emergency Planning and Community Right-to-Know Act of 1986 (hereinafter, "EPCRA")].

The Complainant in this proceeding, the Director of the Environmental Services Division, Region II, United States Environmental Protection Agency ("EPA"), issued a Complaint and Notice of Opportunity for Hearing to Respondent, XXXXXXX ("Respondent"), on May 17, 1994.

The Complaint charged Respondent with six (6) violations of Section 313 of EPCRA, 42 U.S.C. § 11023 and regulations promulgated to that Section, 40 C.F.R Part 372.

FINDING OF FACT AND CONCLUSIONS OF LAW

1. Respondent is XXXX, a corporation duly existing under and organized pursuant to the laws of the State of XXXXX.

2. At all times relevant hereto, Respondent has owned and operated a facility located at XXXX, XXXX, XXXX XXXX (hereafter, "Respondent's Facility").

3. Respondent is a "person" within the meaning of Section 329 (7) of EPCRA, 42 U.S.C. § 11049(7).

4. Respondent is an owner of a "facility" as that term is defined by Section 329(4) of EPCRA, 42 U.S.C § 11104(7), and by 40 C.F.R § 372.3.

5. Respondent's facility is subject to the requirements of EPCRA, Section 313 (b), 42 U.S.C. § 11023(b), and 40 C.F.R. § 372.22.

6. On July 21, 1993 duly designated representatives of the EPA conducted an inspection of and at Respondent's facility (hereinafter, "the Inspection").

7. As a result of the Inspection, EPA issued a Complaint alleging that Respondent failed to submit in a timely manner to the Administrator and to the State XXXX XXXX a complete and correct Form R for XXXX for the calendar year 1991, which would constitute a failure to comply with Section 313 of EPCRA, 42 U.S.C § 111023, and with 40 C.F.R. § 372.30.

8. As a result of the Inspection, EPA issued a Complaint alleging that Respondent failed to submit in a timely manner to the Administrator and to the State of XXXX

Jersey complete and correct Forms R for [Chemical A] for the calendar years 1988, 1989, 1900, 1991, and 1992, which would constitute failures to comply with Section 313 of EPCRA 42 U.S.C § 11023, and with 40 C.F.R. § 372.30 for each of these years.

9. On July 6, 1994, the parties met for an informal settlement conference.

10. EPA withdraws the allegations contained in the Complaint, Count 5. XXXX has satisfied EPA that its XXXXXXXXX facility did not "otherwise use" formaldehyde in excess of threshold quantities during the calendar year 1991.

11. XXXX does not admit as true EPA's Findings of Facts and Conclusions of Law which purport to support EPA's allegation that XXXX violated EPCRA Section 313 on the basis that XXXX XXXXXXXX Facility "manufactured" or "processed" [Chemical A] in excess of threshold quantities during the calendar years 1988 through 1992, as alleged in the Complaint, Counts 1, 2, 3, 4 and 6.

12. On September 14, 1994, the Chemical Manufacturers Association (CMA) sent a letter concerning the reportability of transient reaction chemistry products under EPCRA Section 313 to Mr. Samuel K. Sasnett, U.S.E.P.A., which XXX herein adopts. A copy of the CMA letter is attached to this Consent Agreement.

13. EPA does not consider [Chemical A] to be a transient chemical, but rather a stable chemical species, subject to the reporting requirements of section 313 of EPCRA, 42 U.S.C § 11023 and regulations pursuant to that Section, 40 C.F.R Part 372.

14. XXXX does not agree with the paragraph 13 statement or that current EPCRA regulations require a determination of chemical species stability as a relevant factor in the decision to report.

TERMS OF CONSENT AGREEMENT

Based on the foregoing, and pursuant to Section 325(c) of EPCRA, and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22 (hereinafter, "Consolidated Rules"), it is hereby agreed by and between the parties hereto, and accepted by Respondent, that Respondent voluntarily and knowingly agrees to, and shall, comply with the following terms:

1. Respondent shall pay, by cashier's or certified check, a civil penalty in the amount of **Fifty Six Thousand Two Hundred Fifty Dollars ($56,250)**, payable to the "Treasurer of the United State of America". The check shall be identified with a notation of the name and docket number of this case, set forth in the caption on the first page of this document.

Such Check shall be mailed to:

EPA Region II (Regional Hearing Clerk)
P.O. Box 360188M
Pittsburgh, Pennsylvania 15251

Payment must be received at the above address on or before sixty (60) calendar days after the effective date (the date by which payment must be received shall hereafter be referred to as the "due date").

Respondent shall also send a copy of this payment to Barbara Metzger, Director, Environmental Services Division, U.S. Environmental Protection Agency, Region II 2890 Woodbridge Avenue, Edison, New Jersey 08837.

The effective date of this order shall be the date it is signed be the regional Administrator, shown below.

a. Failure to pay the penalty in full, according to the above provisions, will result in the referral of this matter to the U.S. Department of Justice for collection.

b. Furthermore, if payment is not received on or before the due date, interest will be assessed, at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C § 3717, on the overdue amount from the due date through the date of payment. In addition, a late payment handling charge of $15.00 will be assessed for each 30 day period (or any portion thereof) following the due date in which the balance remains unpaid.

c. A 6% per annum penalty also will be applied on any principal amount not paid within 90 days of the due date.

2. Respondent will undertake the Supplemental Environmental Project (SEP) agreed to between the parties which is to modify the XXXX facility's manufacturing process by controls. This SEP will enable Respondent to reduce XXXX waste discharged by (an estimated) XX to XX pounds per year. Respondent estimates that it will take approximately eighteen (18) months from the entry of this Consent Agreement and Consent Order to complete the installation of the SEP. It is agreed that the SEP will be in place within eighteen (18) months of the entry of this Consent Agreement, and utilized to reduce XXXX waste

discharges as long as the production scheme remains the same. If the SEP is not in place by that time or is not utilized thereafter to reduce waste discharges, for any reason other than the discontinuance of the current manufacturing scheme, the SEP reduction of 25% of the total proposed penalty or **Thirty One Thousand Two Hundred Fifty Dollars ($31,250)** shall be immediately due and payable in accordance with paragraph 1 of this Section.

3. Respondent has submitted estimated costs for the installation of the SEP, which include a general description of the equipment and process to Dr. Ernest Regna, Chief, Pesticides and Toxic Substances Branch, 2890 Woodbridge, Ave., Building 10, (MS-105), Edison, New Jersey 08837, to document Respondent's intention to implement the SEP. Respondent estimates that the project costs for this SEP will equal or exceed $70,000. Respondent agrees to provide EPA three (3) written progress reports on the status of the SEP within six (6), twelve (12) and eighteen (18) months of the entry of this Consent Agreement and Consent Order. Respondent also agrees to retain invoices and other records necessary to document the cost of the SEP and will provide to Dr. Ernest Regna copies of its internal cost summary records in the two status reports. Further, if it is determined that the final cost of this SEP is less that Sixty Two Thousand Five Hundred Dollars ($62,500), Respondent agrees that one half of the cost difference between the actual cost and $62,500 shall be immediately due and payable under the terms specified in paragraph 1 of this Section.

4. This Consent Agreement and Consent Order shall relieve Respondent of its obligation to comply with all applicable provisions of federal, state, or local law, nor shall it be construed to be a ruling on, or determination, any issue related to any federal, state, or local permit nor shall it be construed to constitute an EPA approval of the equipment or

technology installed by Respondent under the terms of this Agreement.

5. Respondent and the signatory for the Respondent both certify, as of the date of Respondent is not otherwise required, by virtue of any local, state or federal statute, regulation, order, consent decree or other law, to perform the tasks specified in Paragraphs 2 though 3 of this Consent Agreement. Respondent's signatory further certifies that Respondent has not already received, and is not currently negotiating to receive credit in any other enforcement action for any of these same tasks.

6. For the purpose of this Consent Agreement, Respondent: (1) admits the jurisdictional allegation of the Complaint, §§ 8 through 14; and (2) neither admits nor denies the specific allegations of the facts in the Complaint or in this Consent Agreement.

7. Each Party to this action agrees to pay its own costs and attorney fees.

8. EPA agrees to respond to the Chemical Manufacturers Association (CMA) regarding the issues raised in its September 14, 1994 letter to Mr. Samuel K. Sasnett, U.S.E.P.A.

9. XXXX agrees to file Forms R for the "manufacturing" and "processing" of [Chemical A] at its XXXX facility for the reporting years 1988 though 1992 within ten (10) days of XXXX's receipt of the executed Consent Agreement and Consent Order. XXXX will send copies of these Forms R to Dr. Ernest Regna.

10. This consent Agreement is being entered into by the parties in full settlement of all civil liabilities, if any, that

might have attached as a result of the allegations in the Complaint. Respondent has read the Consent Agreement and Consent Order; consents to the terms of the Agreement and its issuance as an Order.

11. Furthermore, Respondent consents to the assessment of the civil penalty as set forth in this Consent Agreement and explicitly waives its right to request a hearing on the Complaint, this Agreement, or the attached Consent Order.

12. Respondent waives any right it may have pursuant to 40 C.F.R 22.08 to be present during discussions with or to be served with and to reply to any memorandum or communication addressed to the Regional Administrator or the Deputy Regional Administrator where the purpose of such discussion, memorandum, or communication is to discuss a proposed settlement of this matter or to recommend that such official accept this Consent Agreement and issue the attached Consent Order.

13. Each undersigned signatory to this Consent Agreement certified that he or she is fully authorized to enter into the terms and conditions of this Consent Agreement.

RESPONDENT: XXXX
Date: 11/22/94

COMPLAINANT: Barbara Metzger, Director
Environmental Services

Division

U.S. Environmental Protection
Agency - Region II
2890 Woodbridge Avenue
Edison, New Jersey 08837
Date: December 1, 1994

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CONSENT ORDER

The Regional Administrator of EPA, Region II concurs in the foregoing Consent Agreement, which is being entered into by the parties in full settlement of EPA's Complaint bearing Docket No. II EPCRA-94-0113, issued in the matter of XXXX. The Agreement entered into by the parties is hereby approved and issued, as an Order, effective immediately upon execution below.

Date: 12/12/94

William J. Muszynski, P.E.
Deputy Regional

Administrator

U.S. Environmental Protection
Agency - Region II
26 Federal Plaza
New York, New York 10278